88-74

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE INGERSOLL MILLING MACHINE COMPANY,
and WALDRICH SIEGEN WERKZEUGEMASCHINEN GmbH,

Petitioners,

—v.—

THE HYDRIL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN DOAR
Doar Devorkin & Rieck
233 Broadway, 10th floor
New York, New York 10279
(212) 619-3730
Counsel of Record

Patricia Hair
Crain, Caton, James & Womble
3300 Two Houston Center
Houston, Texas 77010
(713) 658-2323
Counsel for Petitioners

July 11, 1988

QUESTION PRESENTED

Whether the District Court and the Court of Appeals departed from the requirements of Rule 56 by failing to analyze and evaluate the petitioners' evidence before granting respondent's motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure and thus deprived petitioners of their right under Amendment VII of the Constitution to a jury trial.

LIST OF PARTIES

The parties to the proceedings below were the petitioners The Ingersoll Milling Machine Company and Waldrich Siegen Werkzeugemaschinen GmbH and the respondent The Hydril Company. The parties before this Court are the same as those below.

RULE 28.1 LIST

The parent company of petitioner The Ingersoll Milling Machine Company is Ingersoll International, Inc. The Ingersoll Milling Machine Company's affiliates and subsidiaries (other than wholly-owned subsidiaries) are Ingersoll Maschinen und Werkzeuge GmbH, a wholly-owned subsidiary of Ingersoll International, Inc. and parent of Waldrich Siegen Werkzeugemaschinen GmbH, a wholly-owned subsidiary.

The parent company of petitioner Waldrich Siegen Werkzeugemaschinen GmbH is Ingersoll Maschinen und Werkzeuge GmbH, a wholly-owned subsidiary of Ingersoll International, Inc. Waldrich Siegen Werkzeugemaschinen GmbH's affiliates and subsidiaries (other than wholly-owned subsidiaries) are The Ingersoll Milling Machine Company, and Ingersoll Cutting Tool Company, a wholly-owned subsidary of Ingersoll International, Inc.

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THE HYDRIL COMPANY,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners The Ingersoll Milling Machine Company ("Ingersoll") and Waldrich Siegen Werkzeugemaschinen GmbH ("Waldrich Siegen") respectfully request that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit, entered on April 12, 1988, which affirmed the decision of the United States District Court for the Southern District of Texas granting summary judgment in favor of The Hydril Company ("Hydril") on its contract claim against petitioners and dismissing petitioners' counterclaim.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit; the memorandum decision of the United States District Court for the Southern District of Texas granting Hydril summary judgment; and the District Court's judgment are all unreported. They are reprinted in the appendix hereto, at 1a, 2a and 12a.

JURISDICTION

On May 16, 1983, Hydril brought this action in the District Court of Harris County, Texas. On July 1, 1983, the petitioners removed the action to the United States District Court for the Southern District of Texas. On October 29, 1986, the District Court granted Hydril's motion for summary judgment on its contract claim together with prejudgment interest and attorneys' fees. (2a) On April 30, 1987, the District Court entered a judgment for Hydril of $2,705,799.67 less $2,197,112.70 set off against an Ingersoll judgment against Hydril in an unrelated case. (12a) On petitioners' appeal, the United States Court of Appeals for the Fifth Circuit on April 12, 1988, *per curiam*, adopted the memorandum opinion of the District Court and affirmed the judgment. (1a) [Unpublished pursuant to Local Rule 47.5 of the United States Court of Appeals for the Fifth Circuit.]

The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Fifth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves Rule 56 of the Federal Rules of Civil Procedure and the Seventh Amendment to the Constitution of the United States. Rule 56 and the Seventh Amendment to the Constitution are set forth at appendix 15a and 14a.

STATEMENT OF THE CASE

The case involves a contract dispute arising from a March 11, 1982 contract between Waldrich Siegen, a West German machine tool manufacturer and affiliate of Ingersoll, a U.S. machine tool manufacturer, and Hydril, an oil field supplier, for the sale of two special V/H computerized milling machines. About eight months after the contract was formed, and after Waldrich Siegen had almost completed building the machines and Hydril had paid Waldrich Siegen about $2 million in progress payments, Hydril terminated the contract and demanded the return of its money. The petitioner refused, and Hydril brought this action.

In January 1985, after extensive discovery, Hydril moved for summary judgment. The motion was supported by deposition excerpts and deposition exhibits. In response, the petitioners filed excerpts from the deposition testimony of 13 witnesses and 64 exhibits, incorporated in a memorandum and five volume appendix.[1] In October 1986, the District Court, without analyzing or evaluating the petitioners' evidence, granted Hydril summary judgment. Petitioners' evidence is summarized as follows:

A. The Parties' Agreement: The March 11 Contract

On March 11, 1982, Waldrich Siegen and Hydril entered into a contract for the sale of two special V/H computerized milling machines for a price of $1,174,075.00 each. The two machines were yet to be built although they had been already engineered and manufacture had started. Thus the special V/H machines were available to Hydril on very short delivery.

Waldrich Siegen was anxious to sell, and Hydril was anxious to purchase the machines because Hydril badly needed addi-

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1 The Exhibits the petitioners filed are found in the Petitioners' Memorandum in Opposition or in the first two volumes of its 5-volume appendix. Exhibits included with the memorandum were marked by letters A through T. Exhibits included in the appendix were marked by numbers 1 through 43. Certain of these exhibits and three deposition excerpts were reproduced in the Court of Appeals as part of Petitioners' Record Excerpts.

tional manufacturing capability to machine blowout preventer (BOP) bodies.[2] [V-2 Ex. 45 Mattox T 81; Ex. 48 Fusco T 126] Waldrich Siegen committed that the V/H machines would substantially shorten the time required to machine Hydril's BOP bodies, and Hydril made a fast decision to buy because Hydril was impressed with the machines' guaranteed performance. [RE 17, 120-122]

The contract documents consisted of a detailed proposal prepared by Waldrich Siegen and two purchase orders [RE 17, 97-103; V-1 Ex.11], one for each machine, prepared by Hydril (the "March 11 Contract"). Hydril's purchase order first described the Ingersoll CNC V/H Machining System and stated that the purchase order was "in accordance with Ingersoll [sic] Proposal No. A-18443, dated February 15, 1982 (copy attached as addendum No. 1 of the Contract) *except as amended herein*" (the "Purchase Order"). [RE 14]

The Waldrich Siegen proposal described the machine, its specifications, its features, its performance, including a production and accuracy guarantee for two of Hydril's BOP bodies which Hydril intended to machine on the machines, the price and the payment schedule.

The Purchase Order listed 23 items designated as contingency items. Some of the contingency items were amendments to the Waldrich Siegen proposal; others referred to refined definitions as to the performance of the machine. These included a definition of a "production and accuracy guarantee" after Ingersoll had furnished guaranteed times on 26 Hydril BOP bodies and after Ingersoll had developed proposals related to N/C programming, tooling and fixturing concepts, costs and schedule; and after the joint development of a definition of the criteria for machine acceptance.

On page one of the Purchase Order, Hydril provided that the failure of the parties to resolve the contingency items in a manner satisfactory to both parties would render the contract null and void, with all previous payments made by Hydril to be im-

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2 Citations to record take the following form: RE record excerpt, T deposition transcript, V appendix to petitioners' memorandum.

mediately refunded by Ingersoll. On page 11 of the Purchase Order, following the listing of the specifics of the contingency items, Hydril provided that "satisfactory resolution of contingency items will be incorporated into this contract by means of formal purchase order change notices and will require formal release and acknowledgment of acceptance by Ingersoll." [RE 14]

On March 11, 1982, Waldrich Siegen accepted the Purchase Order, and Ingersoll guaranteed Waldrich Siegen's performance. While the parties discussed the refund provision during the negotiations and at the time the contract was formed, there was no evidence that the parties ever discussed whether or not the documentation provision meant that if the contingency items were resolved to the satisfaction of both parties, but for some reason the agreement was not formalized, that Hydril could, regardless of the circumstances, have the return of its progress payments. [V-2 Ex. 48, Fusco T 253-256; Birchall T 390-405] At the time of acceptance, Hydril delivered to Ingersoll two checks totalling $1,174,075.00 payable to Waldrich Siegen as the first progress payment specified in the Purchase Orders. [V-1 Ex. 12, 13; Birchall T 391-392]

After the March 11 Contract was signed, Waldrich Siegen continued to build the machines, with both Ingersoll and Waldrich Siegen spending money for engineering work and in preparing proposals for Hydril with respect to N/C programming, tooling and fixturing. This work continued during March, April and May 1982. During that period the parties worked to resolve the contingency items. [V-2 Ex. 48 Fusco T 293-296; V-1 Ex. 15, 16, 17]

B. The June 25 Agreement

On June 21, 1982, Hydril's Director of Manufacturing wrote the Head of Hydril's Mechanical Products Division that he intended to meet with Ingersoll on June 24, 1982 "to negotiate all aspects, costs and terms associated with the program." He sought approval of a Capital Expenditure Authorization for about $6 million to cover the price of two machines and other

related equipment and services and a progress payment check in order to enhance Hydril's position and negotiating leverage with Waldrich Siegen. [RE 21, 137-40] On the next day Hydril approved the Capital Expenditure Authorization as well as Waldrich Siegen's invoices for $781,348.00 for the second progress payment on the March 11 Contract. [RE 22, 23]

The parties met on June 24 and 25, 1982. By the conclusion of the meeting, they had reached agreement on the resolution of the contingency items in the March 11 Contract, on the purchase of additional equipment and services for the V/H machines, and on the purchase of additional fixturing equipment and N/C programming to be used in the manufacture with the V/H machines of bonnets, a separate Hydril component for its BOPs. The total price for these items came to $5,170,000.00.

The parties signed a summary of the meeting (the "June 25 Agreement"). The memorandum provided that the costs and schedule would be incorporated into specific contract language and finalized by revisions of the two Purchase Orders, and that the agreement and formal order authorization were subject to review and approval of Hydril's top management. At that time Hydril handed Ingersoll the checks totalling $781,348.00 as the second progress payment under the March 11 Contract. [RE 24, 148-151; RE 25, 152-153; RE 29 191-193; V-3 Ex. 51, Demming T 124-132; V-2 Ex. 48, Fusco T 319-320, 322-327, 332-336]

Following this meeting and continuing through October 1982, Waldrich Siegen continued to build the machines. [Belz T 450-451] As for Hydril, after the meeting one of the Hydril representatives, in a contemporaneous internal memorandum, described the result of the June meeting as "negotiated contracts" and advised his superiors that formal documentation of the contracts would commence immediately. [RE 26, 154-156] Hydril then prepared the change orders.

C. Hydril's July 1982 Change Orders

Each change order began by stating that it was revising the Purchase Order "as necessary to incorporate complete 'turn-

key' machinery system requirements", as well as the original machine tool requirements, and that the change order encompassed the Ingersoll proposal and Waldrich Siegen's supplemental proposal submitted in early June, as modified by the June 25 Agreement. The change order then set forth a description and price of each item purchased. [RE 28, 162-190] Before the change order was shown to Ingersoll, Hydril redrafted the change order so that it contained no reference to the June 25 Agreement but provided that the change order "resolves all of the items identified in the Purchase Order as contingent, and it also amends the Purchase Order in other respects." [RE 31, 197-204]

The change orders were executed by the appropriate Hydril managers and given to Ingersoll to review.[3] During August and through September 20, 1982 the parties worked to finalize their agreement into a formal document. [Enfield T 521-525] By September 17, 1982 all of the specific and detailed specifications that related to the equipment covered by the March 11 Contract had been resolved. [RE 32, 205-211; Enfield T 521-525; V-5 Ex. 59 Utsch T 144-151] However, Ingersoll declined to sign the change orders because Hydril, in the specifications relating to certain fixtures, had included a greater quantity of fixturing equipment than that specified in the June 25 Agreement, but had not made a corresponding adjustment in the price. The dollar amount was about $300,000.00. [Birchall T 594-597; Belz T 161-162, 215-217, 333-335, 373-374; Enfield T 164, 452, 500-527; V-5 Ex. 58 Feisel T 130-131; Ex. 59]

The events of July through September 1982 coincided with a continuing and alarming decline in Hydril's oil field business. [V-3 Ex. 50, Goodhart T 114-115; V-3 Ex. 51, Demmings T 96-97; V-3 Ex. 52, Gardner T 103; RE 36, 229-231]

On October 5, 1982, Hydril's Director of Manufacturing sent a memorandum to the head of Hydril's Mechanical Products Division recommending that Hydril no longer proceed with the procurement of the two V/H machines. The bases of his recom-

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3 Ingersoll had been substituted for Waldrich Siegen as the contracting party.

mendation were that the time table for delivery had slipped, Ingersoll was requesting additional funds, the fixturing system developed by Waldrich Siegen had limited flexibility, and the equipment was not needed in light of revised manufacturing projections. [RE 36, 229-231; V-3 Ex. 51, Demmings T 183-189] None of these reasons were grounds for cancellation under the terms of the March 11 Contract or June 25 Agreement.

At the very time Hydril was internally considering a termination, on October 20-23, 1982, Waldrich Siegen held a test run at its plant in West Germany of the first of the two V/H machines. A Hydril representative was present and reported back to Hydril that the machine performed well under all conditions. [RE 39, 227-242] However, on October 29, 1982, Hydril's management notified Ingersoll that it was cancelling its contract and demanded the return of $1,955,424.00. Hydril listed four reasons for its decision to cancel, none of which made reference to the page 11 documentation provision. [RE 37, 232-234; RE 38, 235-236; RE 40; RE 41; RE 42, 249-253]

D. The District Court's Decision

Due to the illness and death of the District Judge to whom the case was assigned, no hearing was held for over a year after the motion for summary judgment was filed. On March 4, 1986, the case was assigned to United States District Judge Lynn Hughes.[4] On April 18, 1986, the court heard oral argument on Hydril's motion for summary judgment. On October 29, 1986, the District Court granted Hydril's motion for summary judgment holding that Hydril was entitled to recover on its breach of contract claim. The District Court explained that Hydril wanted to purchase an entire manufacturing system and that since Ingersoll's proposal did not include items and specifications such as tooling, fixtures, software requirements, manuals and training, Hydril could not determine whether the machine

4 In April, 1986 the United States District Court for the Northern District of Illinois granted Ingersoll judgment against Hydril for $2,197,112.00 plus prejudgment interest on an unrelated contract. Hydril then moved to stay execution of the Illinois judgment and requested a hearing as to its motion for summary judgment.

could ultimately be successful making its parts. Therefore, the court said, Hydril modified the proposal by listing a number of unresolved contingency items and by adding a "refund provision" and a "documentation provision" to the contract.

The court said that months of fruitless negotiation over the contingency items followed and that, by October 29, 1982, Hydril, "tired of waiting for Ingersoll to reach an acceptable level of performance," terminated the contract.

The District Court held that since Ingersoll intended that some kind of a writing be executed to reflect that the contingencies had been resolved, and since it was not plausible to suggest that the parties contemplated the possibility that the contingencies could be resolved in some other way than by a writing executed by both parties, the "documentation provision" procedure was the exclusive way the parties could resolve the contingencies. The court cited deposition testimony of two Ingersoll witnesses and a September 1982 memorandum of a Waldrich Siegen employee to support its finding.

The District Court also held that the agreement signed by the parties in June 1982 was not such a formal acknowledgment.

The court then held that the execution by Ingersoll of a formal document memorializing the resolution of the contingency items was a condition precedent to Hydril's obligation to purchase the two Waldrich Siegen machines and entered summary judgment for Hydril providing for the return of its $1,955,425.00 of progress payments.

REASONS FOR GRANTING THE PETITION

Although the petitioners submitted evidence to establish the existence of genuine issues of material fact as to the contractual intent of the parties and as to the conduct of the parties during their performance of the contract as it effected the Court's interpretation of the documentation clause, the District Court granted and the Court of Appeals affirmed summary judgment and thereby deprived the petitioners of their constitutional right to a trial by jury. This case merits review because the failure to

give any effect to petitioners' material evidence represents a serious departure from the requirements of Rule 56 and is of general importance because of the frequency with which Rule 56 is used to enter judgment before trial; the difficulty, in light of the rules with respect to unpublished opinions, in demonstrating the extent to which lower courts are misapplying Rule 56; and the necessity that Rule 56 be properly applied in order to protect a party's constitutional right to a jury trial.

ARGUMENT

I.

The Decision of the District Court and the Affirmance by the Court of Appeals So Far Departed from the Accepted and Usual Course of Judicial Proceeding Under Rule 56 as to Call For an Exercise of this Court's Power of Supervision

Since the Supreme Court announced its opinions in *Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 106 S. Ct. 1348 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 222, 106 S. Ct. 2505 (1986), motions under Rule 56 have become favored vehicles for relieving the District Court of extended jury trials. When such a motion is made, the district court (and when there is an appeal, the appellate court) reviews the record to determine whether a genuine issue of material fact has been put forward by the non-moving party and explains its decision by reference to the evidence or absence of evidence presented by the non-moving party. In this case this practice was not observed. The District Court recited some evidence put forward by Hydril and, based on it and its own opinion as to what was "plausible," rendered a summary decision, which the Court of Appeals adopted *per curiam*, after noting only that it had made a "thorough review of the record."

The memorandum of the District Court together with the opinion of the Court of Appeals so far depart from the ac-

cepted and usual practice before granting summary judgment as to call for the exercise of this Court's power of supervision.

II.

In Granting Summary Judgment The District and Appellate Courts Have Deprived Petitioners of Their Right to a Trial by Jury

With respect to the proper functioning of the federal judiciary, this Court, in the exercise of its supervisory authority, has declared that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Celotex Corp. v. Catrett*, *supra*, 477 U.S. at 327.

At the same time, the Court spelled out under what circumstances, on a motion of summary judgment, the federal district court should enter judgment forthwith. For a district court to enter summary judgment, there must be no genuine issue of material fact before it. *Anderson v. Liberty Lobby, Inc.*, *supra*, 477 U.S. at 247-8.

The effect of these decisions has been that summary judgment has become an effective tool in dispensing with cases which do not merit a trial. But this Court has made clear that Rule 56 was not to be used to deprive the litigant of the right of a jury trial.

In *Anderson v. Liberty Lobby, Inc.*, *supra*, this Court explained the procedure that the district court should follow: the district court should first determine whether or not there are material facts in dispute. In reaching its decision the district court would be governed by the substantive law of the case. The Court said:

> As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will

> properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. *Anderson v. Liberty Lobby, Inc.*, *supra* at p. 2510.

Once the District Court has identified the material factual disputes, its task is to determine on the basis of the documentary material before it (*e.g.*, affidavits, deposition testimony and exhibits, interrogatory answers, admissions) whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

The petitioners contend there were two genuine issues of material fact before the trial court on which there was a sharp conflict in the evidence, and, therefore, the District Court erred in granting summary judgment.

The *first* issue was the intention of the parties in making their contract. Specifically, what did the parties intend with respect to the documentation provision on page 11 of the Purchase Order? Did they or did they not intend that the provision was the exclusive way to resolve the contingencies? The court held that neither the refund provision nor the documentation provision was ambiguous. The court arrived at this conclusion by considering some of the extrinsic evidence offered by Hydril and determining its caliber and quality. Under Texas law, it was appropriate to consider extrinsic evidence in interpreting the contract to determine the parties' intent. But, the District Court selected bits of respondents' evidence and ignored petitioners' conflicting evidence. The District Court then substituted its own linguistic and business experience for that of the contracting parties when it declared that it was "implausible" that the parties intended the documentation clause to operate otherwise than to place in Hydril's hands the power to declare a forfeiture by terminating the contract.

The District Court isolated pieces of the deposition testimony of two Ingersoll employees and a September 20 writing of a Waldrich Siegen employee to support its conclusion that the

documentation provision was the exclusive permissible way to resolve the contingencies.

But it ignored the following evidence which was also before the court:

1. There was conflicting evidence as to whether the parties intended the contract to constitute a sale of the V/H machines and "everything else necessary to use them" (2a). The language of the March 11 Contract, as contrasted to the deposition testimony of certain Hydril witnesses, was to the contrary. For example, the terms "turnkey" and "proposal acceptable to Hydril" were confined to the installation of the two V/H machines, and there was no price established for a complete manfacturing system, *e.g.*, including attachments, fixtures, tooling and N/C programming, nor were there any criteria established for determining that price. In addition, a contemporaneous memo by Hydril reflected that the parties were negotiating to purchase two V/H machines each with an automatic tool changer and a CNC control. [RE 14, 17]

2. The fact that the parties did not discuss at the time of the contract formation what would be the effect if the parties reached agreement on the contingency items but failed to formalize their agreement. [*infra*, p. 5]

3. The Purchase Order was drafted by Hydril, yet prior to the litigation no Hydril official or legal advisor placed the District Court's construction on the documentation provision.

4. Hydril placed no reliance on and did not even cite the documentation provision in advising Ingersoll its reasons for termination. [*infra*, p. 8]

5. While the Ingersoll employees conceded at deposition that the parties intended to memorialize the resolution of the contingency items, they did not agree that the parties intended that Hydril could recover its progress payments if the contingencies were resolved to both parties' satisfaction, but for some reason the formal documentation did not occur. [Birchall T 76, 117, 188-189, 294, 310-311; RE 33, 212-214; V-5 Ex. 38 Feisel T 208-213]

The *second* material factual dispute was whether Ingersoll was excused from signing Hydril's change order formalizing the resolution of the contingency items by reason of Hydril's conduct in including additional requirements, beyond those agreed to in the March 11 Contract, in the July change orders and by Hydril's refusal either to withdraw the requirements or to pay Ingersoll additional sums for supplying the additional equipment.

The substantive law of Texas implies an obligation on the part of a contracting party to so perform his part of the bargain so that the other contracting party's ability to perform his work is not prevented or impaired, *Hyatt Cheek Bldrs. v. Board of Regents*, 607 S.W.2d 258, 267 (1980); *Tex-Craft Bldrs., Inc. v. Allied Const. of Houston*, 465 S.W.2d 786, 791 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.), and a contracting party may not feign dissatisfaction as a pretext for terminating a contract, *Carlson Mach. Tools, Inc. v. American Tools, Inc.*, 678 F.2d 1253, 1262 (5th Cir. 1982).

The District Court totally ignored this issue of material fact. There was, however, genuine evidence in the record before it that would entitle a jury to find that Hydril's conduct excused Waldrich Siegen's and Ingersoll's performance of the documentation provision as construed by the District Court. This evidence included the following:

1. Immediately prior to the time the June 25 Agreement was signed, Hydril acknowledged in an internal memo that the purpose of the meeting was to negotiate all aspects, costs and terms associated with the program. [RE 21]

2. Hydril approved a Capital Expenditure Request to cover the costs associated with the program. [RE 22]

3. Hydril paid Waldrich Siegen $781,398.00 once the June 25 Agreement was signed. [RE 25]

4. Shortly after June 25 Hydril, in an internal memorandum, referred to the results of the June 25 meeting as a "negotiated contract." [RE 26]

5. The Hydril change orders which incorporated the June 25 Agreement into specific contract language and formalized the revisions of the earlier Purchase Orders were prepared, revised and executed by the appropriate members of Hydril's management and given to Ingersoll. [RE 31]

6. Waldrich Siegen and Ingersoll continued to spend additional money in performing their obligations under the March 11 Contract and the July change order. [*infra*, p. 6]

7. The contingency items in the March 11 Contract had been resolved in fact. [*infra*, p. 7]

8. The Hydril change order included a requirement of additional fixturing equipment. This equipment was not a contingency item in the March 11 Contract. [*infra*, p. 7]

9. The quantity of this additional fixturing equipment had been increased by Hydril beyond what the parties had agreed to in the June 25 Agreement. Hydril refused to amend its change order to pay for it, and this was the reason the petitioners declined to sign the change order. [*infra*, p. 7]

CONCLUSION

The record in this case demonstrates that the lower courts have misapplied Rule 56 in a way that deprived the petitioners of the right of trial by jury. For this reason, the petitioners request that a writ of certiorari be granted to review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

/s/ JOHN DOAR

John Doar
Doar Devorkin & Rieck
233 Broadway, 10th floor
New York, New York 10279
(212) 619-3730
Counsel of Record

Patricia Hair
Crain, Caton, James & Womble
3300 Two Houston Center
Houston, Texas 77010
(713) 658-2323
Counsel for Petitioners

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-2521

THE HYDRIL COMPANY,

Plaintiff-Appellee

versus

THE INGERSOLL MILLING MACHINE COMPANY, and WALDRICH SIEGEN-BOHLE-INGERSOLL MASCHINEN UND WERKZEUGE GmbH,

Defendants-Appellants

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-83-4055)

(April 12, 1988)

Before

THORNBERRY, GEE and POLITZ,

Circuit Judges.

PER CURIAM:*

A thorough review of the record persuades us that the careful opinion of the trial court is correct. For the reasons there stated the judgment is

AFFIRMED.

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-83-4055

HYDRIL COMPANY,

Plaintiff,

vs.

INGERSOLL MILLING MACHINE COMPANY, et al.,

Defendants.

MEMORANDUM

Hydril has sued the Ingersoll companies for return of a deposit Hydril made on a conditional contract to purchase milling machines. Ingersoll has sued Hydril for breaching the contract. Hydril wins.

Background.

Waldrich Swigers Werkzeugmaschinen GmbH (Waldrich), like Ingersoll Milling Machine Company (Ingersoll), is a subsidiary of Ingersoll International. In August 1981, Waldrich began construction of two vertical/horizontal milling machines. At that time NL Industries was considering purchasing them. After NL eventually declined to buy them, Ingersoll, acting as Waldrich's sales agent, submitted a written sales proposal to Hydril Company in February 1982.

Hydril wanted to purchase the machines to manufacture parts for ram blowout preventers. It wished to acquire a package of the machines and everything else necessary to use them. Ingersoll's proposal did not include items or specifications (including tools, fixtures, software requirements, manuals, and training) sufficient for Hydril to be able to implement the sys-

tem; Hydril, on the basis of the criteria in the proposal, could not determine whether the machines would ultimately be successful manufacturing blowout preventer parts at the rates and qualities required by Hydril.

For these reasons, the two purchase orders negotiated by Hydril and Ingersoll in March 1982 included numerous changes from the terms of the sales proposal and also listed numerous contingency items that were unresolved between them.

On page one, each purchase order says:

> [F]ailure to resolve the listed contingency items in a manner satisfactory to both parties will render this contract null and void, with all previous monetary payments made by Hydril to be immediately refunded by Ingersoll. [refund provision].

On page eleven, each purchase order says:

> [S]atisfactory resolution of contingency items will be incorporated into this contract by means of formal purchase order change notices which will require formal release and acknowledgment acceptance by Ingersoll. [documentation provision].

Following execution of the purchase orders between Waldrich and Hydril (with International guaranteeing Waldrich's performance) on March 11, 1982, Hydril advanced $1,174,076.00 to Ingersoll. Months of fruitless negotiations over the contingency items followed. Three months later the parties met in Rockford, Illinois, and signed a memorandum, and Hydril advanced $781,347.00 more. By October 29, 1982, Hydril tired of waiting for Ingersoll to reach acceptable levels of performance and terminated the purchase orders, requesting refunds of all advances. Ingersoll refused.

Hydril has brought claims for breach of contract, assumpsit for money had and received, fraud, conversion, violation of the Texas Deceptive Trade Practices Act (DTPA), tortious interference by Ingersoll with the agreement between Hydril and Waldrich, and conspiracy. The defendants have counterclaimed for breach of contract.

This memorandum addresses three motions:

(1) Hydril's motion for partial summary judgment on the contract and DTPA claims;

(2) Ingersoll's motion for summary judgment on deceptive trade practices and to dismiss counts on fraud, conversion, tortious interference, and conspiracy; and

(3) Ingersoll's motion for partial summary judgment on the set off question.

Hydril's Motion for Partial Summary Judgment.

Summary judgment is appropriate on the contract claim. The simplicity of the contract problem presented by this case stands in stark contrast to the volume of briefing and exhibits before the court.

Nobody argues that either of the two purchase order provisions quoted above is ambiguous. On the first refund provision, neither side finds anything to argue about. The controversy revolves largely around the second provision; the question is just what was necessary to constitute a binding resolution of the contingency items. The defendants contend that a writing signed by both was not required. It is clear that some kind of writing was required to effectuate a resolution of the contingency items. Representatives of the defendants have conceded as much. Ronald Enfield, Ingersoll's project manager, testified unequivocally on deposition that he understood the purchase order to require a written change order to resolve the contingencies. Furthermore, it is not plausible to contend that the parties contemplated the possibility that the contingencies could be resolved in some way outside the scope of the second provision; the second provision was the exclusion of the permissible ways to resolve the contingencies. Tom Birchall, a vice president of Ingersoll and negotiator of the purchase order terms, testified on deposition about the defendants' willingness to be bound by the second provision. Moreover, it appears that on September 20, 1982, a conversation took place between Birchall, Enfield, and a WASI vice-president named Dieter Feisel, which was summed up in a memorandum Feisel sent to Enfield, Birchall,

WASI's president Helmut Belz, and others. The memorandum notes that Hydril's "contractual situation is such that they get all their advance back in case they cancel the whole project."

This clear recognition at that time by several officers of the defendants of Hydril's right to its refund is one reason the court cannot accept the defendants' contention that the contingency items were resolved by the meetings of June 24-25, 1982. Another reason is that the memorandum that emerged from those meetings clearly is not self-executing but contemplates further writings:

> [t]he above agreements represent *basis of cost and schedule positions* to be incorporated into specific contract language and subsequently formalized by revision to Hydril [the purchase orders]. These actions and formal order authorization are *subject to* the review and approval of Hydril MPD and corporate office representatives. [emphasis added]

The resolution of the contingency items through the execution, release, acknowledgment, and acceptance of formal written change orders was condition precedent to Hydril's obligation to purchase the machines. The defendants' contention that the two provisions could only have constituted a condition precedent if combined into one paragraph is wrong. *See Kosberg v. Brown*, 601 S.W.2d 414, 416 (Tex. Civ. App.—Houston [14th Dist] 1980, no writ). The court will grant summary judgment for Hydril on its contract claim for a refund.

Deceptive Trade Practices.

The basis of the deceptive trade practices claim is Hydril's contention that the defendants maintain a secret policy of: (1) remaining silent as to what position they may take if a customer cancels an order and (2) trying to recover costs and profits whenever a customer cancels.

There is indeed such a policy, as a written policy statement of Ingersoll and Birchall's deposition testimony make clear. The court is at a loss, however, to understand what is so sinister about the policy or, more important, in what way it motivated

the defendants to behave with deceit or duplicity. The policy statement says that normally its business orders will not include an alternative way to end the contract. In this case the defendants apparently broke their own rules, since Hydril was allowed the option of cancelling should the contingencies not be resolved to its satisfaction.

The statement further says that Ingersoll's contracts are silent as to what will happen when "unexpected and unavoidable major revisions" in a customer's program has occurred. It is not clear to the court that this phrase encompasses the Hydril contract at all, since the possibility of cancellation for non-resolution of the contingency orders was clearly contemplated from the start; the plain language of the statement seems to refer to some completely unexpected catastrophe. Leaving aside the question of the meaning of the policy's language, however, the court finds nothing unconscionable or deceitful in the policy, nor does the deposition testimony referred to by Hydril indicate in any way that the defendants intended not to be bound by the provisions of the purchase orders at the time they negotiated the contract with Hydril. The contract superseded the policy.

Hydril also quotes a statement by Birchall that Ingersoll "would not give information to any customer that might jeopardize a sale." Standing in isolation these words summon up visions of a used car salesman failing to tell a customer that the car he is about to buy has not had the oil changed in the last 100,000 miles. Taken in context, however, the words indicate nothing sinister. Birchall made this less than brilliant statement during a discussion in deposition about the fact that the defendants did not tell Hydril about NL's reasons for deciding not to buy the machines. While it might have been courteous to have made the disclosure, the court sees no deceptive trade practice in not reporting the reasons NL said it chose not to buy the machines. There is no genuine issue of fact about the existence of a DTPA violation.

Fraud.

The court will treat the defendants' motion to dismiss Hydril's fraud claim as a motion for summary judgment. Fed. R. Civ. P. 12(b). This is possible despite the fact that the defendants' motion refers to no matter outside the pleadings. 5 Wright & Miller, *Federal Practice & Procedure* § 1366. The court looks to the policy statement and deposition testimony on which Hydril bases its DTPA claim. Hydril's assertion in its complaint that the defendants have committed acts of fraud unknown to Hydril is insufficient to raise a fact issue. The record contains nothing that creates or supports a fact issue on the question of fraud.

Conversion.

The court will dismiss Ingersoll's claim for conversion because an action for conversion cannot be maintained for the recovery of money except where the facts of the case allow the money to be regarded as a specific chattel. *Graham v. Turner*, 472 S.W.2d 831 (Tex. Civ. App.—Waco 1971, no writ); *Upper Valley Aviation v. Mercantile Nat'l Bank*, 656 S.W.2d 952, 955 (Tex. App.—Dallas 1983, writ ref'd n.r.e.); *Houston Nat'l Bank v. Biber*, 613 S.W.2d 771, 774 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.).

Tortious Interference.

The court must dismiss Hydril's claim that Ingersoll interfered tortiously with the Hydril-WASI agreement. Ingersoll was not merely WASI's guarantor; the facts show a participation by Ingersoll so extensive that renders Ingersoll, for the purpose of this question, a party to the agreement. A party cannot interfere tortiously with its own contract. Even if Ingersoll is regarded as functioning only as WASI's sales agent and guarantor, its interference would be privileged because of its substantial financial stake in the matter. *Cf., e.g., Morris v. Jordan Financial Corp.*, 564 S.W.2d 180, 184 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.).

Conspiracy.

The court will dismiss Hydril's claim of conspiracy to defraud under DTPA because both defendants are wholly owned subsidiaries of the same corporation and, therefore, cannot, as a matter of law, conspire with one another. *Hood v. Tenneco Texas Life Ins. Co.*, 739 F.2d 1012, 1015 (5th Cir. 1984); *Century Oil Tool, Inc. v. Production Specialties, Inc.*, 737 F.2d 1316, 1317 (5th Cir. 1984).

Set Off.

In a transaction entirely distinct from the one that forms the basis of this action, Hydril's Tubular Division contracted with Ingersoll for the purchase of other equipment (the tubular contracts). In September 1984, Hydril amended its complaint in this action to allege a right to set off the amount it owed Ingersoll under the tubular contracts against the amount it sought to recover in this action. Hydril then withheld payment on the tubular contracts. In the Northern District of Illinois, Ingersoll then sued Hydril for breach of contract and obtained a judgment against Hydril. *Ingersoll Milling Machine Co. v. Hydril Co.*, No. 85-C-20006 (N.D. Ill. 1986). The court in Illinois reserved to this court the propriety of the set-off claim. This court enjoined Ingersoll from executing the Illinois judgment until disposition of that question.

Hydril is entitled to set off the $2,310,277.36 judgment awarded to Ingersoll in the Northern District of Illinois against the judgment awarded by this court to Hydril. Execution of the Illinois judgment for breach of the tubular contract was stayed pending the outcome of Hydril's claim for the return of funds advanced toward the purchase of milling machines. Debts need not arise out of the same transaction or contract to set one off against the other. Where debts are liquidated, set off is appropriate even though they arose out of separate transactions. *Northwest Lumber Sales, Inc. v. Continental Forest Products, Inc.*, 495 P.2d 744 (Or. 1972). For a claim to be set off it "must be liquidated or capable of liquidation and grow out of a contract or judgment." *Marks v. Spitz*, 4 F.R.D. 348, 350 (D. Mass. 1945). The debts arising out of the tubular and milling

machine contracts are liquidated since they have been fixed in judgments.

> There is no doubt of the power of the courts, independent of any statute, to set off mutual judgments. But this power will be exercised only upon careful consideration of all the circumstances of the transaction out of which the judgments arose and in order to protect the right of the parties, and when it involves no infringement on other rights of equal grade. Accordingly, the right of set-off will be denied where facts, external to the judgments themselves, make a set-off inequitable.

Citizens Industrial Bank of Austin v. Oppenheim, 118 S.W. 820, 822 (Tex. Civ. App.—Austin 1938, appeal dism'd). Ingersoll has not shown any facts other than that the debts arose from separate transactions which would make set off inequitable.

California law is even more liberal than Texas in permitting set-off claims; it is not necessary that the claim of the judgment debtor be liquidated, "it being sufficient that the claim though unliquidated has matured." *Erlich v. Superior Court of Los Angeles County*, 407 P.2d 649, 651 (Cal. 1965).

The power to stay execution of a judgment on the grounds that there is an action pending on a disputed claim by the judgment debtor against the judgment creditor was recognized in *California Cotton Credit v. Superior Court*, 15 P.2d 1108 (Cal. Dist. Ct. App., 1932).

> In determining whether to enjoin collection of the judgment pending decision of the validity of the disputed claim, the court should consider the likelihood that the judgment debtor will recover upon his claim, the probability and comparative amount of recovery, and the ability of the judgment creditor to respond should a judgment be rendered against him in the action on the disputed claim. The fact that the judgment creditor may have an immediate need for the funds due to him upon his judgment is not a basis for denial of relief where the foregoing considerations otherwise compel relief.

Erlich at 652. (1) Hydril has actually recovered on its claim; (2) both parties claim substantial sums for the breaches; and (3) the decree entered by this court will not be an inordinate burden on Ingersoll's eventual right to collect its judgment.

The cases relied upon by Ingersoll do not apply to situations where set off was based on liquidated claims; for instance, in a banking case, the court held that "to give rise to a right of set-off, matured indebtedness must be certain and already reduced to precise figues or capable of being liquidated by calculation without the intervention of a court or jury to estimate them." *Faber, Coe & Gregg, Inc. v. First National Bank*, 246 N.E. 96 (Ill. App. Ct. 1969). Hydril has satisfied the requirements of *Faber*: the claims are matured and the exact amount of the debts settled by two courts. Ingersoll next quotes a Texas case, "Mutual debts do not extinguish each other in the absence of agreement or judicial action." *Benton v. Wilmer Hutchins Independent School District*, 662 S.W.2d 696, 698 (Tex. Civ. App.—Dallas 1983, appeal dism'd). In this case judicial action has already been taken, twice. *Benton* defines a liquidated debt as one agreed upon by operation of law. In *C. R. Bard, Inc. v. Medical Electronics Corp.*, 529 F. Supp. 1382 (D. Mass. 1982), the set-off claim was not a mature, liquidated debt embodied in a final judgment. U.C.C. § 2.717, which limits recoupment, is not helpful to Ingersoll since it does not invalidate the principles of contract law upon which this court relies. U.C.C. § 1.103.

Ingersoll offers no authority for its contention that issuing an injunction in one federal court affecting a judgment awarded in a sister court leads to chaos. By permitting the setting off of a final judgment in a sister court, this court has facilitated the orderly, efficient settlement of claims litigated close in time by identical parties.

Conclusion.

The court will enter a judgment that Hydril recover $1,955,423 from Ingersoll, plus prejudgment interest and attorney's fees as a credit against the judgment in *Ingersoll v. Hydril*. If the parties are not able to agree on the calculation of the components of the judgment amount, each shall submit within

ten days its own version. If the submissions cannot be reconciled by the court, a hearing will be ordered.

Signed on October 29th, 1986, at Houston, Texas.

/s/ LYNN N. HUGHES

Lynn N. Hughes
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-83-4055

THE HYDRIL COMPANY,

Plaintiff,

VS.

THE INGERSOLL MILLING MACHINE COMPANY, et al.,

Defendants.

FINAL JUDGMENT

It is adjudged that the Hydril Company recover from the Ingersoll Milling Machine Company and Waldrich Siegenbohle-Ingersoll Maschinen und Werkzeuge GmbH:

$1,955,423.00	principal;
265,886.67	pre-judgment interest;
449,000.00	attorneys' fees; and
35,490.00	expenses.
$2,705,799.67	
($2,197,112.70)	Illinois judgment.
$ 508,686.97	net recovery.

The judgment in *Ingersoll Milling Machine Company v. Hydril Company*, No. 85-C-20006, United States District Court for the Northern District of Illinois, Western Division, dated April 3, 1986, is declared satisfied.

The order that Hydril post security of $116,000 dated May 21, 1986, is vacated.

This judgment of $508,686.97 bears post-judgment interest at 6.30%.

Signed on April 30, 1987, at Houston Texas.

/s/ LYNN N. HUGHES

Lynn N. Hughes
United States District Judge

THE CONSTITUTION OF THE UNITED STATES

Amendment VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

FEDERAL RULES OF CIVIL PROCEDURE

RULE 56

Summary Judgment

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in

controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

NO. 88-74

IN THE

Supreme Court of the United States

OCTOBER TERM 1988

THE INGERSOLL MILLING MACHINE COMPANY, AND WALDRICH SIEGEN WERKZEUGEMASCHINEN GmbH,
Petitioners,

v.

HYDRIL COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT HYDRIL COMPANY'S BRIEF IN OPPOSITION

N. K. ALEXANDER, JR.
Counsel of Record

RONALD C. LEWIS
BAKER & BOTTS
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1234

Attorneys for Respondent

Alpha Law Brief Co., Inc. — 8748 Westpark—Houston, Texas 77063 — 789-2000

RESTATED QUESTION PRESENTED FOR REVIEW

Did the District Court and the Court of Appeals apply the proper standards under Rule 56 of the Federal Rules of Civil Procedure in granting Respondent's Motion for Summary Judgment?

RULE 28.1 LIST

Hydril Company has no parent companies, affiliates or subsidiaries (other than wholly-owned subsidiaries).

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NO. 88-74

IN THE

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Petitioners,

v.

HYDRIL COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT HYDRIL COMPANY'S BRIEF IN OPPOSITION

Respondent Hydril Company ("Hydril") respectfully requests that this Court deny the Petition for a Writ of Certiorari, seeking review of the fifth circuit's opinion in this case. Neither the appellate court's nor the district court's decisions were reported. Both are reprinted in the Appendix to the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

Petitioners have sought review in this Court of the summary judgment granted Respondent Hydril Company, plaintiff in the district court, on Hydril's state law claim that Petitioners breached the refund provisions of the Purchase Order contracts between Hydril and Petitioners. The district court's opinion granting summary judgment is unpublished, as is the decision of the fifth circuit affirming the district court judgment.

In moving for summary judgment, Hydril relied on no testimony of its own witnesses; instead, it relied *exclusively* on the unambiguous terms of the contracts at issue and the admissions of Petitioners' employees whom Petitioners designated to testify in their behalf on the key issues in the lawsuit pursuant to Rule 30(b)(6), F. R. Civ. P. *Every* fact recited in this Statement of the Case, as in Hydril's motion for summary judgment, comes directly from the contracts at issue or from the mouths or the pens of Petitioners' witnesses. Petitioners' Statement of the Case demonstrates a remarkable lack of candor about these admissions and undisputed facts. As shown below, these admissions by Petitioners' representatives were devastating to Petitioners' effort to show a genuine issue of material fact to forestall summary judgment.[1]

Hydril's contract claim sought to enforce the remedy expressly provided for in the Hydril Purchase Orders,

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1. Among those designated, whose testimony on behalf of Petitioners supports Hydril's Statement of the Case, are Ron Enfield, Project Manager for Petitioners on the "Hydril project"; Tom Birchall, Vice President and General Manager of Petitioner Ingersoll at the time of the transaction; Helmut Belz, President and Chief Executive Officer of the Petitioner WASI; and Dieter Feisel, Commercial Director of WASI.

that Petitioners refund money which Hydril had advanced on those Purchase Orders because certain contingency items were never resolved in writing to the parties' satisfaction as required by the terms of the Purchase Orders.

On granting Hydril summary judgment, the district court ruled on the plain terms of the contract, noting that Hydril's contract claim was simple because (1) no party claimed that the provisions of the Purchase Orders were ambiguous; (2) it was clear the Purchase Orders required some type of writing to effectuate a resolution of the contingency items; and (3) the Purchase Orders prescribed the exclusive means of resolving the contingencies. Because these contingencies were not resolved in the manner dictated by the Purchase Order contracts, summary judgment for Hydril was proper.

1. The History of the Machines.

The two Hydril Purchase Orders that are at the heart of this lawsuit concerned a combination of goods and services to be supplied by Waldrich Siegen Werkzeugemaschinen GmbH ("WASI"). Ingersoll and WASI, sister companies that manufacture and sell machine tools, accepted the Purchase Orders from Hydril on March 11, 1982. Ingersoll guaranteed the performance of the Purchase Orders by WASI and acted as sales agent for WASI.

In the Purchase Orders, Hydril conditionally ordered two complete machining systems (including two computer controlled vertical/horizontal milling machines commonly referred to as "V/H machines") which were supposed to enable Hydril to manufacture many different sizes of blowout preventer parts. Enfield 85-86, 112-113,

117.[2] However, the particular V/H machines that were specified in the Purchase Orders were not originally designed for Hydril's needs. Petitioners had designed and begun construction of the machines in August 1981 (long before Hydril was approached about them) for NL Industries, who later refused them. Belz, 47-49; Feisel, 42; Chalmers, 39; Palmer, 9, 12-15; Birchall, 97-98, 100-101.

Stuck with two expensive machine tools designed for a "purchaser" who did not want them, Petitioners sought to unload the machines by selling them to Hydril. Petitioners submitted a written proposal to Hydril in February 1982. Belz, 57-67; RE 12.

2. The Contracts Require Resolution of the Contingency Items in Writing.

Petitioners' proposal did not include all the necessary equipment, engineering, services, and criteria concerning the efficiency of the V/H machines to put the machines into use for Hydril's applications. Without them, Hydril could not be certain that the machines could effectively and efficiently manufacture blowout preventers because the machine had never been used for that purpose. Hydril, therefore, submitted Purchase Orders that extensively amended Petitioners' proposal and specifically identified numerous "contingencies" to be resolved to the satisfaction of both parties by written change orders.

These contingencies included the necessary tooling, fixturing, computer programming, manufacturing meth-

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2. Deposition citations are found among Exhibits to Hydril's Motion for Partial Summary Judgment, which are bound in separate volumes in the record on appeal. References to Record Excerpts filed with the court of appeals are denoted "RE."

ods, performance standards, service, and installation at a mutually agreeable price to be determined, all required in order to put the machines to work making blowout preventers. The Purchase Orders were "conditioned" on the parties agreeing to purchase order change notices formally released by Hydril and accepted by Petitioners resolving all of these contingencies. Petitioners knew when they accepted Hydril's Purchase Orders that Hydril's only possible interest in the V/H machines was as part of a "turnkey" package. They also knew that numerous contingencies had to be resolved and agreed on to complete the "turnkey" system. Birchall, 138-139, 169, 425-426; Enfield, 112-113, 408.

The Purchase Order contracts explicitly provide that failure to resolve the contingency items in written amended purchase orders to the satisfaction of all parties would render the contracts null and void, with all advances by Hydril against the orders to be refunded in full. Enfield 164, 175.[3] The exact Purchase Order provisions on which the motion for summary judgment and the district and appellate courts' judgments are predicated read:

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3. Petitioners were not happy about this provision; when the Hydril Purchase Orders were presented to Mr. Birchall on March 11, 1982, he objected to Hydril's termination and refund rights. Birchall, 404-405. However, Hydril insisted that Petitioners accept this risk because Hydril had no assurance that either the performance or ultimate price of the systems could be agreed on. Birchall, 401-402, 404-405. Anxious to sell these machines which NL had earlier rejected and in which WASI had a substantial investment because WASI had begun their construction at Ingersoll's premature direction, Birchall agreed to the Purchase Orders accepting all their terms, including the termination provision, for Petitioners. Birchall, 76-77, 175-176, 401-402, 404-405; Belz, 70-71, 81-82; Feisel, 64.

> FAILURE TO RESOLVE THE LISTED CONTINGENCY ITEMS* IN A MANNER SATISFACTORY TO BOTH PARTIES WILL RENDER THIS CONTRACT NULL AND VOID, WITH ALL PREVIOUS MONETARY PAYMENTS MADE BY HYDRIL TO BE IMMEDIATELY REFUNDED BY INGERSOLL.

Exhibits B and C, p. 1, to Hydril's Motion for Partial Summary Judgment.

> SATISFACTORY RESOLUTION OF CONTINTINGENCY ITEMS WILL BE INCORPORATED INTO THIS CONTRACT BY MEANS OF FORMAL PURCHASE ORDER CHANGE NOTICES WHICH WILL REQUIRE FORMAL RELEASE AND ACKNOWLEDGEMENT ACCEPTANCE BY INGERSOLL.

Exhibits B and C, p. 11, to Hydril's Motion for Partial Summary Judgment. The Purchase Orders listed at least 22 or 23 individual contingency items, including such basic items as pricing, fixturing, design criteria, and performance criteria. Enfield, 492.

Petitioners indisputably knew, understood, and admit that failure to resolve the contingency items in subsequent formal, written amendments or change orders, accepted and acknowledged by all, rendered the original Purchase Orders null and void and entitled Hydril to a refund. Birchall, 175-176, 183, 232-233, 349-350; Enfield, 164, 175, 231-233. In fact, Petitioners' own Hydril project manager, Ron Enfield, designated by Petitioners to testify concerning the resolution of the contingencies in the Hydril Purchase Orders, expressed repeatedly and unequivocally the understanding of all parties that the contingencies would be resolved by written amendments signed and accepted by all parties. Enfield, 164, 175, 231.

Mr. Birchall (who negotiated the contract for Petitioners) also testified that Petitioners had agreed to be bound by that provision and that the contingency items should be reduced to writing. Birchall, 294. It is undisputed by all parties that no resolution of the contingency items was ever reduced to formal change orders which were accepted and acknowledged by the parties. Birchall, 272-273, 283-284, 294-295. Mr. Birchall admitted, as Petitioners' designated representative, that he knew that if the contingency items were not resolved to the satisfaction of Petitioners and Hydril, then Hydril was entitled to have all of the money it paid refunded to it. Birchall, 232-233.

3. The Attempts to Resolve the Contingencies in Writing Fail.

After the conditional Hydril Purchase Orders were executed, the parties tried to reach a mutually satisfactory resolution of the numerous contingency items for seven months. Petitioners' Project Manager Ron Enfield, designated to testify about efforts to resolve contingency items, admitted Hydril worked "in good faith" on the project, noting that Hydril expended fully 150 man-weeks in an effort to satisfactorily resolve the contingency items, even though Hydril, as the proposed purchaser, had no duty to participate in the design of the machine system Petitioners were trying to sell. Enfield, 166, 168-169, 227.

As part of the effort to resolve the contingency items, the parties met in a series of meetings in June 1982 and drafted a memorandum dated June 25, 1982 reflecting certain cost and scheduling matters. Petitioners contended in the district court that this memorandum was a resolu-

tion of the contingency items. The district court held that this claim is belied by the plain language of the document, which expressly states that it is merely a "cost and schedule" plan (and says nothing about the many contingency items enumerated in the Purchase Orders) that still required formal written amendments to the Purchase Orders:

> The above agreements represent basis of cost and schedule positions to be incorporated into specific contract language and subsequently formalized by revision to Hydril P.O. #26007 and #26008. These actions and formal order authorization are subject to the review and approval of Hydril MPD and corporate office representatives.

RE 24; Petition Appendix at 5a.

Petitioners' Statement of the Case ignores the fact that their own Project Manager, Ron Enfield, whom Petitioners designated to testify about resolution of the contingency items, admitted that the June 25th memorandum did not resolve the contingencies, and that Petitioners later withdrew the very proposals for resolving the contingency items that were under consideration on June 25th. Enfield, 147-48, 419; Utsch, 54, 58, 62-63; Vol. III, Ex. 59 Appendix to Defendants' Memorandum in Opposition to Hydril's Summary Judgment Motion.

In July 1982, Hydril generated and transmitted written formal purchase order change notices setting forth Hydril's proposals for resolving the contingency items. Petitioners admit that they refused to sign or accept this effort by Hydril to resolve the contingency items in accordance with the Purchase Orders' requirements. Birchall, 272-273, 283-284, 457. Petitioners readily admit they never

executed any formal purchase order change notices embodying a mutually satisfactory resolution of the contingency items, and no resolution of the contingency items was ever reached. Enfield, 163-169; Birchall, 272-273; Belz, 152, 216-217. There is no evidence that Petitioners even proposed any change order notices of their own incorporating the supposed resolution of the contingency items they claimed occurred.

4. The Smoking Gun.

Petitioners' most revealing admission, specifically noted by District Judge Hughes in his Memorandum, is completely ignored in Petitioners' Brief. On September 20, 1982, concerned about the lack of agreement concerning the contingencies on the now long overdue project, Mr. Birchall, the Ingersoll Vice-President responsible for the Hydril project, Mr. Feisel, the WASI Commercial Director responsible for the project, and Mr. Enfield, the Project Manager, discussed the effect of the inability of the parties to agree on a resolution of the contingency items. Feisel summarized the situation in a memorandum he sent to WASI President Belz, Birchall, Enfield, and WASI engineers working on the project.

The admissions of this "smoking gun" memo totally belie the position Petitioners took in opposing summary judgment. It reads:

> Although a number of items could get clarified during the last week's meeting, like times, fixturing methods, we did not achieve our main objective to get the final contract signed.
>
> . . .

> We believe the proper analysis of the total situation is as follows:
>
> . . .
>
> D. For two reasons Hydril is in a strong bargaining position of which they are aware:
>
> . . .
>
> 2. *Their contractual situation is such that they can get all their advance payments back in case they cancel the whole project.*

(Emphasis added). RE 33; Feisel, 211-212; Birchall, 598-599; Belz, 239.

Mr. Feisel was prescient. In late October, after eight months of negotiations, with the contingencies still not resolved and the project way behind schedule, Hydril exercised its contract right to terminate the Purchase Orders and receive a refund of its advances. Belz, 216-18; Enfield, 448; RE 3. Petitioners refused to refund Hydril's advances, notwithstanding their failure to deliver a single screw to Hydril, much less a complete manufacturing system. Belz, 209-210; Birchall, 269.

5. The Decisions Below.

United States District Judge Lynn Hughes properly granted Hydril's motion for summary judgment because there is no genuine issue of material fact concerning any issue. The district court ruled that Hydril was entitled to summary judgment on its contract claim because:

1) The provisions of the Hydril Purchase Orders at issue are unambiguous, as all parties admit;

2) The key contract terms required resolution of the contingency items in writing;

3) The clear, undisputed evidence shows that the contingency items were never resolved in writing; and

4) The remedy the contract provided Hydril was entitled to was a refund of its advance payments.

The district court's ruling is supported by not only the unambiguous terms of the Purchase Orders, but also the undisputed facts *admitted* by Petitioners' designated representatives in discovery. The testimony that the district court had before it was not only just unrefuted admissions by Petitioners' own witnesses, but also testimony that bound the Petitioners unequivocally because the witnesses were designated to speak for and bind Petitioners pursuant to Rule 30(b)(6).

The fifth circuit panel (Judges Thornberry, Gee, and Politz), after its own "thorough review of the record," affirmed *per curiam,* in an unpublished opinion.

REASONS FOR DENYING THE PETITION

I.

The Unpublished Unanimous Decisions of the Court of Appeals and the District Court Demonstrate No Departure from the Well-Settled Law Pertinent to Summary Judgment Motions in Contract Cases.

This case is utterly unworthy of review by this Court. Not only are the decisions of the district court and the court of appeals correct and without any apparent or real conflict with the decisions of this Court, this case involves only state law issues of contract interpretation and a pedestrian application of Rule 56. These are not issues that now require this Court's attention.

The district court ruled in an unpublished opinion that based upon (1) the plain language of the contract and (2) the sworn admissions of Petitioners' own witnesses that Petitioners chose to testify in their behalf under Rule 30(b)(6) on the key issues, there was no genuine issue of material fact regarding the interpretation of the contract at issue. A unanimous fifth circuit panel, after its own "thorough review of the record," affirmed *per curiam* in an opinion that was unpublished under Fifth Circuit Local Rule 47.5 that provides for opinions not to be published when they "have no precedential value and merely decide particular cases on the basis of well-settled principles of law." Even if both courts misapplied the law to the facts, it is difficult to see how their unpublished decisions deviate from the well-defined standards for summary judgment on which this Court has already written three times in the last two years so as to merit review in this Court. *See Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 222 (1986). There is simply *nothing* in either opinion below that reflects any misunderstanding of Rule 56 or conflicts with this Court's interpretation of that rule. The opinions turn entirely on the unique facts of this case.

II.

The Court of Appeals and the District Court Properly Applied Rule 56 and the Substantive Texas Law of Contracts.

In an attempt to find a certiorari-worthy issue, Petitioners have invented a non-existent "requirement" that they say the opinions of the courts below failed to meet.

Petitioners say that the district court and the court of appeals erred in failing to write out in their opinions the evidence or absence of evidence presented by Petitioners and explain why it does not produce a genuine issue of material fact.

This claim is wrong in two respects. The first reason is there simply is no requirement imposed either by the text of Rule 56 or this Court's interpretation of it that a district court must mechanically recite each piece of evidence offered by the non-moving party and write out its explanation for why that evidence is irrelevant, immaterial, or insufficient to raise a *genuine* issue of fact. There is simply no practical need for this Court to create such a requirement. While imposing such an onerous burden on district courts might ease the task of the courts of appeals, it is likely to deter district courts from granting summary judgments in all but the most brutally simple cases, and is unlikely to forward Rule 56's role as an integral part of the Federal Rules "to secure the just, speedy and inexpensive determination of every action." F. R. Civ. P. 1; *Celotex Corp. v. Catrett*, 477 U.S. at 327. For this reason perhaps, this Court has already held that upon granting a motion for summary judgment, "[t]here is no requirement that the trial judge make findings of fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 250. Instead, this Court has said, the duty of a district court on a motion for summary judgment is to determine

> whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Anderson, 477 U.S. at 251-52.

The second reason that Petitioners' criticism of the district court's opinion is without merit is that the district court's opinion (adopted by the fifth circuit after its own "thorough review of the record") *did* articulate the reasons that as a matter of law Hydril must prevail on its contract claim. It is important to recall that under Texas law, the sole issue on which summary judgment was granted, the interpretation of an unambiguous contract, was an issue of law for the court to decide:

> It is elementary that if there is no ambiguity, the construction of the written instrument is a question of law for the Court. *Myers v. Gulf Coast Minerals Management Corp.*, 361 S.W.2d 193 (Tex. 1962). It is the general rule of the law of contracts that where an unambiguous writing has been entered into between the parties, the Courts will give effect to the intention of the parties as expressed or as is apparent in the writing. In the usual case, the instrument alone will be deemed to express the intention of the parties for it is objective, not subjective, intent that controls. *Woods v. Sims*, 154 Tex. 59, 273 S.W.2d 617, 620 (1954). See generally: 3 Williston on Contracts § 610 (1936); Restatement of the Law of Contracts § 230 (1932).

City of Pinehurst v. Spooner Addition Water Co., 432 S.W.2d 515, 518 (Tex. 1968). In short, the interpretation of a contract unambiguous on its face is an issue of law, not fact, and thus ideally suited to summary adjudication under Rule 56.

As the district court noted, "nobody argues that either of the two purchase order provisions [at issue] is ambiguous." Petitioners' Appendix, p. 4a. Contrary to Petitioners' claim that a genuine issue of fact existed regard-

ing the intent of the parties (Petition, p. 12), this was not an issue in the district court because the contract is unambiguous. The district court ruled that the resolution of Hydril's contract claim was simple because (1) no party contended that the provisions of the purchase order contracts were ambiguous (2) "[i]t is clear that some kind of writing was required to effectuate a resolution of the contingency item," and (3) the page 11 provision prescribed the exclusive means of resolving the contingencies.

What Petitioners apparently object to is that the district court did not stop there, but went on to note that the admissions of Petitioners' own witnesses whom Petitioners designated to testify on these matters were completely in accord with the plain terms of the contract—that Hydril would be refunded its money if the contingency items were not resolved in writing. Petitioners seem to say that the district court having mentioned *some* evidence aside from the contract itself, it erred in failing to recite *all* the evidence and explain its immateriality or insufficiency. That is not, and should not be, the law.

But even if it were, the five pieces of evidence Petitioners claim the district court "ignored" (Petition, p. 13) are insufficient to forestall summary judgment on the contract interpretation issue because they are (1) not even germane to the interpretation of a contract unambiguous on its face under the legal standard the district court was bound to apply; (2) even if germane to the interpretation of the contract, insufficient to raise a *genuine* issue of material fact; (3) unsupported by the record; and (4) insufficient to overcome the admissions of Petitioners' own designated representatives that Hydril got its money back if the contingency items were not

resolved in writing to the satisfaction of both parties as required under the contract.

Similarly, the second alleged "genuine issue" Petitioners claim the district court "ignored," whether Petitioners were "excused from signing Hydril's change orders" (Petition, p. 14), is not an issue in the case at all. Rather, it is Petitioners' belated attempt to raise an affirmative defense of bad faith by Hydril that Petitioners never pled in the district court. Affirmative defenses must be pled, and may not be raised for the first time on a motion for summary judgment or on appeal. F. R. Civ. P. 8(c); *Gulf Union Industries, Inc. v. Formation Security, Inc.*, 842 F.2d 762, 765 (5th Cir. 1988); *United States v. Burzynski Cancer Research Institute*, 819 F.2d 1301, 1307 (5th Cir. 1987), *cert. denied*, ____U.S.____, 108 S. Ct. 1026 (1988).

The only issue before the district court was whether Petitioners breached the unambiguous contract which provided that failure to resolve the contingencies in written change orders accepted by both parties entitled Hydril to a refund of its money. The issue of fact Petitioners tried to raise to defeat summary judgment in the district court and the court of appeals was *not* that they were "excused" from the obligation to return Hydril's money because Hydril in bad faith refused to agree to resolve the contingency items (as they suggest here), but rather that Hydril *did* agree to a resolution of them in the June 25th memorandum. That dog having failed to hunt in the district and appellate courts for the reasons explained by the district court (Petition Appendix at 5a), Petitioners now ask for review in this Court on the basis that the lower courts "ignored" a defense of bad faith that Petitioners failed to plead.

Of the evidence Petitioners point to in support of this belated "defense" (Petition, pp. 14-15), Points 1-4 were addressed by the district court and conclusively rebutted by (1) the fact the June 25 memorandum explicitly stated that it did not constitute the change orders required by the contract and (2) the admissions by Petitioners' own designated representatives that the June 25 memorandum did not resolve the contingency items as required by the contract (*see* p. 8, *supra;* Petitioners' Appendix at 4a-5a). Point 5 ignores the undisputed evidence that Petitioners never accepted the change orders Hydril proposed, and in fact Petitioners admit they abandoned the very proposals for resolving the contingency items that were on the table at the time of the June 25th memorandum. *See* p. 8, *supra.* Point 6, that Petitioners spent money, is simply irrelevant. Points 7-9 are plain misstatements of the undisputed evidence and ignore the unqualified admissions of Petitioners' designated witnesses that the contingency items were never resolved as required under the contract. *See* pp. 8-9, *supra.* Again, the district court and appellate court found that the contractual language was unambiguous and construed the meaning of the contract as a matter of law.

In sum, the "evidence" Petitioners recite offers no more than a scintilla of support for their unpleaded defense. That is not enough.

> As *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970), and *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968), indicate, there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Cities Service*, 391 U.S. at 288-289. If the evidence is merely colorable,

> *Dombrowski v. Eastland*, 387 U.S. 82 (1967) (*per curiam*), or is not significantly probative, *Cities Service*, *supra* at 290, summary judgment may be granted.

Anderson, 477 U.S. at 249-50. When the district court and the court of appeals matched Petitioners' proferred evidence against the unambiguous terms of the contract, the sworn admissions of Petitioners' own designated witnesses that the contingency items were not resolved and that Hydril was entitled to a refund if the resolution of the contingency items were not agreed in written change orders accepted by both parties, and the smoking gun document revealing that Petitioners' own executives knew Hydril was entitled to a refund, they properly concluded that the evidence was "so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 252.

III.

The District and Appellate Courts Have Not Denied Petitioners of Their Right to a Trial by Jury.

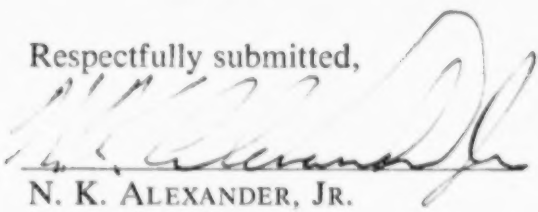
A properly granted summary judgment does not deprive a party of their right to a jury trial. Summary judgment is proper only when there is no genuine issue of material fact, i.e., when there is nothing to be decided by a jury. Petitioners' attempt to bolster their argument by appeals to their right to a jury trial fails.

CONCLUSION

There are no special or important reasons for granting the Petition in this case. The unpublished opinions of the district court and the court of appeals demonstrate no

deviation from the standards for granting motions for summary judgment set out in Rule 56 and the interpretations of that rule by this Court. The Court has recently addressed the standards to be applied under Rule 56, and this case provides no opportunity to further enlighten jurisprudence in this area. The Petition not only fails to meet the Supreme Court Rule 17 standard of showing that the decision of the court of appeals "has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision," there must be few court of appeals' decisions less worthy of certiorari than this unpublished *per curiam* opinion in a state law diversity jurisdiction case. Accordingly, Respondent Hydril Company requests that the Petition for Writ of Certiorari be denied, and that all costs be taxed against Petitioners.

Respectfully submitted,



N. K. ALEXANDER, JR.
Counsel of Record

RONALD C. LEWIS
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1688

Attorneys for Respondent Hydril Company

Of Counsel:

BAKER & BOTTS
Houston, Texas

(3)

No. 88-74

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE INGERSOLL MILLING MACHINE COMPANY,
and WALDRICH SIEGEN WERKZEUGEMASCHINEN GmbH,

Petitioners,

—v.—

THE HYDRIL COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

JOHN DOAR
Doar Devorkin & Rieck
233 Broadway, 10th Floor
New York, New York 10279
(212) 619-3730
Counsel of Record

Patricia Hair
Crain, Caton, James & Womble
3300 Two Houston Center
Houston, Texas 77010
(713) 658-2323
Counsel for Petitioners

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—v.—

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

In its opposing brief, Hydril argues that if the district and appellate court had observed the standards for granting summary judgment and for appellate review thereof, but had misapplied those standards to the facts of the case, that would not be a basis for this Court to grant petitioners' application. Therefore, Hydril argues, certiorari is inappropriate in this case.

Hydril mistakes the basis of the petition. The petition urges this Court to grant certiorari because the two lower courts departed from the requirements of Rule 56 and because the case is of general importance. If Rule 56 comes to be applied as in this case, litigants' constitutional right to a jury trial will be vio-

lated as petitioners' have been in this case. The correction of an erroneous decision by the lower courts is the result but it is not the reason for the writ to be granted.

A review of the reported decisions in the various circuits leaves no doubt it is the accepted and usual course of judicial practice under Rule 56 that neither the trial judge nor the appellate court is to make creditability determinations, weigh evidence or draw from the facts legitimate inferences for the movant. The evidence of the non-movant is to be believed and viewed in the light most favorable to him. All justifiable inferences are to be drawn in his favor.[1]

Petitioners are not contending that "a district court must mechanically recite each piece of evidence offered by a non-moving party and write out its explanation for why that evidence is irrelevant, immaterial or insufficient to raise a genuine issue of fact." (Hydril Brief, p. 13) While it is true that there is no requirement that the trial judge make findings of fact[2] lower courts must not be free to grant summary judgment and thus deprive a party of its constitutional right of trial by jury without analyzing and evaluating the non-movant's evidence. The district court did not do this. It decided from an examination of the record before it that "Hydril wins." Petitioners' Appendix 2A. It then summarized Hydril's evidence that supported its conclusion. On appellate review, the Court of Appeals adopted the District Court's opinion. It is this disregard of the requirements of Rule 56 in unpublished opinions to which we object. We do not ask the Court to review the evidence, but we submit this reply to Hydril's opposing memorandum because it presents only a version of the evidence and the inferences to be drawn that is favorable to Hydril.

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1 See Fitzwater et al., *Recent Summary Judgment Jurisprudence for the Fifth Circuit Practitioner*, 5 Fifth Cir. Rptr. 769 (1988).

2 This court has noted that "In many cases, however, findings are extremely helpful to a reviewing court." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 222, 106 S.Ct. 2505 (1986).

I.

The issue of the contracting parties' intention is not appropriately decided on a motion for summary judgment

The district court decided for Hydril because it believed it was authorized to interpret, on summary judgment, the contract once it had characterized the contract as unambiguous. But the purpose of contract interpretation is to discern the actual intention of the parties, the intention of both parties if they are the same, or the actual intention of one party if the other party knew or had reason to know what it was. The purpose of contract interpretation is not to give effect to a meaning of words that neither party in fact gave them.

In this case the district court held the parties bound to a meaning that seemed clear to the court, "it is not plausible to contend that the parties contemplated the possibility that the contingencies could be resolved in some way outside the scope of the second provision." Petitioners' Appendix p. 4. If that conclusion did not reflect the intention of the parties it was wrong for the court to make a contract for the parties that they did not make.

In its opposing brief Hydril emphasized that the court held that since both sides contended the language of the contract was unambiguous, that that made the contract unambiguous and hence an issue of law for the court to decide. But each side argued for a dramatically different interpretation of the contract.

In the lower court Hydril took the position that the page 1 and 11 clauses meant something the words do not say, that is, that until a writing was executed by both parties documenting the resolution of the contingency items, the items remained "unresolved," even if the parties had in fact agreed to the terms and conditions to be incorporated in this writing. Hydril insisted, therefore, that without such documentation it is entitled to the return of all its progress payments regardless of whether or not the contingencies had been agreed to, and regardless of Waldrich Siegen's performance of the contract.

Waldrich Siegen's and Ingersoll's position was that the page 11 clause as written was unambiguous and stated only that once the contingency items had been agreed to, a writing would be executed by the parties documenting that fact. Therefore, Waldrich Siegen and Ingersoll insisted that the words of the page 11 clause did in no way require the automatic return of Hydril's progress payments upon proof that a writing had not been executed.

Furthermore, the court considered and then relied on extrinsic evidence favorable to Hydril without acknowledging the existence of contrary evidence favorable to petitioners to support its interpretation of the contract. This was not proper on summary judgment because the evidence was in conflict. If the court was going to consider extrinsic evidence, and if petitioners' evidence showed there was a dispute about the meaning of the contract, the district judge was bound to wait until he heard the complete testimony at trial before ruling on the effect of that conflicting extrinsic evidence and deciding whether the court or jury should decide how the contract should be interpreted.

II.

There were genuine issues of material fact

In its opposing brief Hydril insists that there were no genuine issues of material fact before the Court. It focuses on two alleged undisputed facts to support its conclusion.

First, Hydril contends that there was no dispute that the parties entered into a contract for a manufacturing system with related tooling, fixtures and N/C programming and that a formalized executed agreement in writing as to a tooling package, a fixture package and a software package were required before Hydril would lose its right under the contract, if it were not satisfied, to a full refund of its progress payments. While Hydril witnesses testified at deposition to as much, and the district court stressed this point in granting summary judgment, Waldrich Siegen's proposal clearly offered for sale two Ingersoll CNC V/H Machine Tools. RE 12, p. 1 of proposal. Section

III of its proposal identified and described the machine tool's features to include an automatic tool changer and a CNC control. There was no mention of tooling, fixtures or N/C programming as integral parts of the machining system that Waldrich Siegen offered to sell. RE 12, pp. 12-19 of proposal. Hydril's Purchase Order clearly identifies the machine tool described in Waldrich Siegen's proposal but amended it in certain respects labeled as contingencies. One contingency was that the definition of the "production and accuracy guarantee" would be defined after Ingersoll had completed guaranteed times on all ram BOP body configurations and after development of associated N/C programming, tooling and fixturing concepts, costs and schedule proposals by Ingersoll. RE 14. There were no contingency items related to firm contracts for tooling, fixtures or N/C programming at agreed upon prices.[3] RE 14.

Hydril ignores this language and insists that the parties entered into a conditional contract to purchase an entire manufacturing system designed to manufacture "many different sized BOP parts that Hydril would be certain would efficiently and effectively manufacture blow-out preventers.

Furthermore, the petitioners' witnesses flatly disputed this interpretation of the contract. Tom Birchall, the Ingersoll representative who executed the contract on behalf of Waldrich Siegen, testified that discussion of a turnkey system did not even surface until long after the contract was formed. (V-4 Ex. 53, Birchall T 138-139) He testified that there were discussions

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3 The exact language of this contingency item was as follows:

"(1) SECTION II, PAGES 2 & 3—PRODUCTION AND ACCURACY GUARANTEE.

•WILL BE DEFINED AFTER COMPLETION OF "GUARANTEE TIMES" ON ALL RAM BOP BODY CONFIGURATIONS AND AFTER DEVELOPMENT OF ASSOCIATED N/C PROGRAMMING, TOOLING AND FIXTURING CONCEPTS, COST AND SCHEDULE PROPOSALS, BY INGERSOLL.

DEVELOPMENT OF "GUARANTEE TIMES" AND ASSOCIATED SUPPORT PROPOSALS BY INGERSOLL WILL BE AT NO COST TO HYDRIL."

about additional hardware and equipment necessary to run Hydril's parts and that Hydril wanted a source of supply for all the things needed to support a manufacturing system and that Ingersoll was expected to propose a fixturing system, and a programming system because that was what Hydril desired, (V-4 Ex. 53, Birchall T 425-426) but he denied that the elements that would convert the sale of a machine tool into the sale of a manufacturing system were part of the contract. V-4, Ex. 53, Birchall T 181, 238, 242, 310-311, 423-424, 430, 738-740.

As a second illustration, in its opposing brief, Hydril makes a repeated effort to persuade the reader that there was a specific clause in the contract that required that the resolution of the contingency items be in writing and that Ingersoll admitted this. This is not the fact.

In its opposing brief, Hydril places the two clauses together as if that is the way they appeared in the contract. They did not. The contingency clause was up front on page one. The documentation claim was 10 pages away on page 11. It said nothing about the consequence of failure to document the resolution of the contingency items.

In an effort to support its misstatement of the actual contract language, Hydril claims that petitioners' witnesses were in accordance with "the plain terms of the contract"—that Hydril would be refunded its money if the contingency items were not resolved in writing. Hydril misrepresents this testimony.

Tom Birchall executed the contract. As hard as Hydril's counsel tried, Birchall would not agree that the page 11 clause meant what Hydril was trying to force it to mean.

Birchall testified that he discussed the page 1 and page 8 clauses with Fusco, a Hydril employee, but there was no discussion of the page 11 clause. He admitted that he did not take any exception to the page 11 clause and saw no reason for it not to be followed. V-4 Ex. 53, Birchall T 187. He repeatedly testified on cross-examination that while he agreed that he was willing to be bound by the page 11 clause (V-4 Ex. 53, Birchall T 188), he did not agree that the page 11 clause meant that the parties

intended that Hydril would get all its money back if a written change order was not prepared and executed by both parties. V-4 Ex. 53, Birchall T 189. Furthermore, Birchall testified that while Ingersoll and Waldrich Siegen had agreed to reduce the resolution of the contingency items to writing, they were, in fact, reduced to writing and Ingersoll and Waldrich Siegen were prepared to sign the change order except for one disagreement. V-4 Ex. 53, Birchall T 310-311.

Hydril's trial attorney tried to force Birchall to agree that the reason for the page 11 clause was to avoid any misunderstanding between the parties as to whether they actually had a firm agreement on the open items. However, Birchall would not agree. Birchall testified as follows:

> We had agreed that the contingency items should be reduced to writing, and they were reduced to writing, and as I stated earlier in my testimony, we were prepared to sign those documents, except for one disagreement over the amount of hardware that was being provided. V-4 Ex. 53, Birchall T 294.

Birchall testified that bonnets or bonnet hardware were never discussed by the parties at the time of the formation of the contract. V-4 Ex. 53, Birchall 272, 284

As for Enfield, Belz and Feisel, the other three Rule 30(b)(6) witnesses, none of these witnesses had anything to do with the negotiation about the contract language. Belz and Feisel were half-a-world away in West Germany. They never even saw the Hydril purchase orders before Birchall accepted them. Ron Enfield, an Ingersoll employee with a shop background, was assigned in April, 1982, about a month after the contract was signed, to act as the coordinator of the project. He had nothing to do with the negotiation of the terms of the contract or its execution. His job was to move the project forward; to see that Waldrich Siegen completed "guarantee times" on all of Hydril's ram BOP body configurations, and that Ingersoll completed the development of "associated N/C programming, tooling and fixturing concepts, cost and schedule" proposals

before the definition of "production and accuracy guarantee" was agreed to by the parties. RE 14.

Hydril selected out of context several of Enfield's answers to several leading questions which suggest that he believed the parties intended the resolution of the contingency items would be by a writing. This is the very evil which this case presents. Hydril picks and chooses its evidence, then claims it is worthy of summary judgment. However, his deposition in its entirety shows that Enfield did not fully understand what Hydril would later contend he was agreeing to. Enfield did not agree that Hydril was entitled to all its money back absent a written agreement as to the resolution of the contingency items. Furthermore, Enfield did testify that in September 1982 the contingency items were resolved to both parties' satisfaction and that Fusco of Hydril had given him a retyped copy of the schedule setting forth the guaranteed times. He further testified that the part of addendum 1, the comprehensive change order, that Ingersoll did not agree to was the quantities of fixtures to hold the bonnets. V-4 Ex. 55, Enfield T 521-525.

Hydril refers to a memo Feisel, an employee of Waldrich Siegen who lived and worked in Germany, wrote on September 20, 1982, RE 33, 212-214 (properly dated September 21, 1982), as a smoking gun, but Hydril does not tell the Court Feisel's explanation for that memo. With respect to that memo, Feisel explained that he was concerned about Hydril's leverage because of the provision, but he was not passing any kind of judgment as to the legal right of Hydril to get its money back.

III.

The Petitioners properly raised the issue of justifiable excuse for not executing the written change order

Hydril argues that the petitioners are barred from raising the claim that they were excused from signing the change orders by reason of Hydril's conduct in including additional requirements (in the July change orders) beyond those agreed to in the March 11 contract, and by Hydril's refusal either to withdraw the requirements or to pay Ingersoll additional sums for supplying the additional equipment.

In paragraphs 25 through 41 of its first amended counterclaim, the petitioners set forth the principal facts related to this claim. R 643-644. The petitioners alleged that at Ingersoll's request, Hydril modified Addendum No. 1 so that it reflected the parties' resolution of all items agreed to in their Rockford agreement, and in agreements reached at meetings thereafter, except with respect to the number and size of certain fixturing equipment that Hydril had specified it had agreed to purchase, ¶ 40, but that petitioners did not sign the change orders because the change orders did not accurately reflect the agreement reached at the Rockford meeting with respect to the number of sets of bonnet fixtures which defendants would furnish for the agreed upon price, and because the change orders did not take into account certain additional costs of approximately $47,000.00 which defendants would incur in manufacturing, at Hydril's request, all of the pallets for the blowout preventer bodies to conform to the length of the pallets for the bonnets ¶ 41.

Rule 7(c) of the Federal Rules of Civil Procedure states that when a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, if justice so requires, shall treat the pleading as if there had been a proper designation.

In this case the issue of a justifiable excuse was presented to the district court and to the appellate court. It was raised and simply ignored.

Respectfully submitted,

/s/ JOHN DOAR

John Doar
Doar Devorkin & Rieck
233 Broadway, 10th Floor
New York, New York 10279
(212) 619-3730

Counsel of Record

Patricia Hair
Crain, Caton, James & Womble
3300 Two Houston Center
Houston, Texas 77010
(713) 658-2323

Counsel for Petitioners

September 19, 1988